

The claimant alleged she acquired an occupational disease, bronchial asthma, in March or June of 1992 as a result of being exposed to cold temperatures while working for the respondent. The Administrative Law Judge denied benefits and held that claimant had failed to prove she had acquired an occupational disease that arose out of and in the course of her employment. The claimant requested the Appeals Board to review that finding. The sole issue now before the Appeals Board is whether claimant has proven she acquired an occupational disease as defined by the Workers Compensation Act while working for the respondent during the period alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant contends she now has bronchial asthma that was triggered by working in the cold temperatures of respondent's meat packing plant. Claimant began working for the respondent in July 1988. Although claimant's medical history is somewhat unclear, it appears she began having bronchial problems as early as 1989.

Because of her bronchial condition, claimant terminated her employment with respondent in August 1992. Since that time, she has not looked for work, but would be willing to return to work for respondent if she could work in a warm environment.

The Workers Compensation Act provides that an individual is entitled to benefits when they acquire an occupational disease as a result of their employment. Occupational disease is defined by K.S.A. 44-5a01 as follows:

"(b)Occupational disease' shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. 'Nature of the employment' shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general."

Claimant presented the testimony of Herman Zegarra, M.D., a general practitioner in Garden City, Kansas. Dr. Zegarra first saw claimant on June 6, 1992 for bronchial spasm disease which he characterized as bronchial asthma. Bronchial asthma is a condition in which the bronchi react to factors which make the bronchi constrict causing the passageways of the airways to narrow. The result is shortness of breath, impairment of respiration and secretion of the mucosa. Dr. Zegarra testified there are two types of asthma, extrinsic and intrinsic. Extrinsic asthma is produced by external factors which produce the narrowing of the airways, such as dust for example. Intrinsic asthma is not significantly influenced by outside factors but is a condition that develops within a person regardless of external factors. Intrinsic asthma typically appears in middle age. There are some known factors that trigger intrinsic asthma, such as exercise and aspirin, although

it is unknown why they do. Dr. Zegarra believes claimant has intrinsic asthma. When questioned as to whether cold may trigger claimant's asthma, Dr. Zegarra was uncertain and stated:

"Q. Let me make sure that you understand my question. You said that in your opinion the cold and asthma are related.

A. Yes.

Q. You've also said that the cold may or could be a triggering factor for the asthma.

A. Yes.

Q. May be a factor means to me that it could or it could not be a factor, and that there's no way of telling for sure.

A. Yes."

The Appeals Board finds the evidence presented fails to establish it is more probably true than not that claimant has a disease that either was caused or permanently aggravated by her employment with the respondent.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 1991 Supp. 44-508(g) as:

" . . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is:

" . . . on the claimant to establish claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 1991 Supp. 44-501(a).

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge as set forth in the Award that are not inconsistent with the specific findings and conclusions made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson entered in this proceeding on February 28, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jon R. Craig, Garden City, KS
Terry J. Malone, Dodge City, KS
Thomas F. Richardson, Administrative Law Judge
Philip S. Harness, Director